

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

TIERRA INTELECTUAL BORINQUEN, INC. Plaintiff	CASE NO. 2:13-cv-39-JRG CONSOLIDATED LEAD CASE
v.	
HTC CORPORATION et al., Defendants	
TIERRA INTELECTUAL BORINQUEN, INC. Plaintiff,	CASE NO. 2:13-cv-47-JRG
v.	
TOSHIBA CORPORATION, et. al., Defendants	

TOSHIBA’S NOTICE PROVIDING ALTERNATIVE CONSTRUCTION FOR
“MEASURABLE VARIABLE INPUT”

Toshiba Corporation and Toshiba America Information Systems, Inc. (collectively, “Toshiba”) submit this Notice Providing Alternative Construction for “Measurable Variable Input” regarding U.S. Patent No. 7,350,078; U.S. Patent No. 7,725,725; and U.S. Patent No. 8,429,415.

In accordance with the Parties’ statements before the Court during the Claim Construction Hearing held on May 5, 2014, the Parties met and conferred regarding proposed alternative constructions for “measureable variable input.” Plaintiff Tierra Intelectual Borinquen, Inc. and Defendants HTC Corporation and HTC America, Inc., came to an agreed proposed construction (*see* D.N. 108), but Toshiba does not agree with that proposed construction. Toshiba provides the following alternative construction for the Court’s consideration, which is intended to address several of the Court’s concerns and questions about Toshiba’s previous proposed construction.

<u>TOSHIBA’S ORIGINAL PROPOSED CONSTRUCTION (D.N. 96 at 11)</u>	<u>TOSHIBA’S ALTERNATIVE CONSTRUCTION</u>
A variable quantity that can be measured, in contrast to a discrete quantity or condition that can be identified exactly.	<p>Measureable characteristics of a user’s input that are inherently inexact.</p> <p>For example, “measureable variable input” from a keyboard could include the measured characteristics of “timing, intervals, and durations of key presses and pauses,” but does not include keyed-in text characters.</p>

Toshiba’s alternative construction substitutes “measureable characteristics” for “a variable quantity” because this is how the applicant described the measureable variable inputs of the Zilberman reference. ‘078, Col. 1:21-28 (“The microcontroller was employed ‘to *measure certain characteristics* of the user’s keystroke dynamics’ independent of the typed text, including the timing, intervals, and durations of key presses and pauses. These *measured characteristics* were then used as integral information for authenticating a user’s identity.”).

During the Claim Construction Hearing, the Court questioned the meaning of the term “discrete,” as it was used in Toshiba’s original proposed construction. Toshiba’s revised construction omits this term, and instead uses the term “inexact” to address the concept of variability in the user’s input. *See* ‘078, Col.4:10-23 (“difficult-to-exactly-replicate”), Claim 5 (“designated tolerance of inexactness”); TIB’s Opening Br., D.N. 93 at 15 (“Certain types of signals are inexact because of their very nature.”).

Lastly, Toshiba proposes including an example in the construction to give the jury some context for the meaning of “measureable variable input.” The proposed example is based on applicant’s discussion of the Zilberman prior art reference (quoted above). ‘078, Col. 1:21-28.

Toshiba respectfully submits the above alternative construction for this Court’s consideration.

Dated: May 9, 2014

Respectfully Submitted,

/s/ Katie J.L. Scott

Katie J.L. Scott (Cal. Bar No. 233171)
Gabriella E. Zicarelli (Cal. Bar No. 292226)
DICKSTEIN SHAPIRO LLP
1841 Page Mill Road, Suite 150
Palo Alto, CA 94304
Telephone (650) 690-9500
Facsimile (650) 690-9501
Email: ScottK@dicksteinshapiro.com
Email: ZicarelliG@dicksteinshapiro.com

Jeffrey K. Sherwood
Texas Bar No. 24009354
DICKSTEIN SHAPIRO LLP
1825 Eye Street, NW
Washington, DC 20006
Telephone: (202) 420-2200
Facsimile: (202) 420-2201
Email: SherwoodJ@dicksteinshapiro.com

Michael C. Smith (Texas Bar #18650410)
SIEBMAN, BURG, PHILLIPS & SMITH, LLP
113 E. Austin Street
P.O. Box 1556
Marshall, Texas 75671
Telephone (903) 938-8900
Facsimile (903) 767-4620
Email: michaelsmith@siebman.com

**ATTORNEYS FOR DEFENDANTS TOSHIBA
CORPORATION AND TOSHIBA AMERICA
INFORMATION SYSTEMS, INC.**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document on this 9th day of May, 2014, via the Court's CM/ECF system per Local Rule CV-5(a)(3).

/s/ Katie J.L. Scott

Katie J.L. Scott